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Nos. 82-1517 and 82-1541

In the Supreme Court of the United States

OCTOBER TERM, 1982

MISSION INSURANCE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

M/V BIG SAM, IN REM, and ZITO TOWING, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*, precludes a remedy under general maritime tort law for the United States to recover oil-spill cleanup costs from a third party whose act or omission was the sole cause of the spill.

2. Whether the United States has a cause of action under general maritime tort law to recover its cleanup costs from such third party.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A29) and the opinion upon denial of rehearing and rehearing en banc (Pet. App. A30-A47) are reported at 681 F.2d 432 and 693 F.2d 451, respectively.[1] The

[1] The petitioners in this case have filed separate petitions seeking review of the same decision of the court of appeals. The appendices to the petitions are identical in content and

opinions of the district court (Pet. App. A48-A69, A70-A73, and A74-A86) are reported at 454 F. Supp. 1144, 480 F. Supp. 290, and 505 F. Supp. 1029, respectively.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1982. A petition for rehearing was denied on December 13, 1982. The petition for a writ of certiorari in No. 82-1517 was filed on March 12, 1983, and that in No. 82-1541 was filed on March 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Water Pollution Control Act are set out at Pet. App. A1-A3.

STATEMENT

1. On April 25, 1975, the tug M/V BIG SAM collided with the barge T/B BUTANE on the Mississippi River. The BUTANE, in tow of another tug, was carrying oil, and the collision resulted in the discharge from the BUTANE of 280,000 gallons of oil into the river. The Coast Guard spent almost $300,000 to remove the spilled oil (Pet. App. A5-A6).

Following its cleanup of the oil spill, the United States brought this suit in the United States District Court for the Eastern District of Louisiana to recover its cleanup costs. Named as defendants were petitioner BIG SAM, in rem; petitioner Zito Towing, Inc., the owner of the BIG SAM; petitioner Mission Insurance Company, the insurer of the BIG SAM; Tri-Capt, Inc., the bareboat charterer and operator

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pagination, and therefore they will be referred to indistinguishably as "Pet. App."

of the BIG SAM at the time of collision; and the BUTANE and its owner. The government alleged causes of action under the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. (& Supp. V) 1251 *et seq.*, the Refuse Act of 1899, 33 U.S.C. 407, and general maritime tort law (Pet. App. A6). The parties stipulated that the negligence of the BIG SAM was the sole cause of the collision (*id.* at A6-A7).

On defendants' motions, the district court dismissed all but the government's FWPCA claim (Pet. App. A70-A73). The court held that the FWPCA, 33 U.S.C. (Supp. V) 1321(g), constitutes the government's exclusive remedy for recovering oil-spill cleanup costs from a non-discharging third party whose sole fault causes the discharge and that other remedies are not preserved by 33 U.S.C. 1321(h)(2), which provides that "[t]he liabilities established by this section shall in no way affect any rights which * * * the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge * * *" (Pet. App. A3).

Under Section 1321(g), a third party that is the sole cause of the discharge of oil into the navigable waters of the United States is strictly liable (without proof of negligence) for the government's cleanup costs up to specified monetary limits; in addition, the third party is fully liable for such costs without limit if the "discharge was the result of willful negligence or willful misconduct within the privity and knowledge of such third party" (Pet. App. A1-A2).[2]

[2] This third-party liability under Section 1321(g) is in place of the liability of the discharger, who is subject to strict liability within certain limits, and to full liability for willful negligence or willful misconduct, unless it "can prove that a

At the time of the collision involved in this case, the limit on strict liability under the FWPCA was the lesser of $100 per gross ton of the vessel or $14,000,000 (*ibid.*).[3] Since the government did not allege willful negligence or willful misconduct within privity, the district court computed cleanup costs based on the 155-ton gross weight of the BIG SAM and entered a judgment for the United States in the amount of $15,500 ($100 per ton x 155 tons) (*id.* at A86).[4]

2. The government appealed the dismissal of its maritime tort claim for negligence.[5] The court of appeals reversed, holding that "any maritime tort remedy of the United States against the negligent vessel is not preempted by § 1321(g), in view of the express provision of 33 U.S.C. § 1321(h)(2) that the

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discharge was caused *solely* by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) *an act or omission of another party without regard to whether any such act or omission was or was not negligent* * * *." 33 U.S.C. (Supp. V) 1321(f) (Pet. App. A1) (emphasis added).

[3] These limits were increased by the 1977 FWPCA amendments to $125 per gross ton or $125,000, whichever is greater. Pub. L. No. 95-217, Section 58(d)(2), 91 Stat. 1595.

[4] The judgment was originally assessed only against Tri-Capt, the bareboat charterer and operator of the BIG SAM at the time of the collision (Pet. App. A78-A83). However, the court of appeals held that a third-party vessel in rem and its non-operating owner are liable jointly and severally, along with the operator who caused the accident, for cleanup costs under the FWPCA (*id.* at A14-A19). Petitioners have not sought review of that holding.

[5] The government also appealed the dismissal of its cause of action under the Refuse Act of 1899, 33 U.S.C. 407. The court of appeals upheld that part of the judgment, however, and we do not now seek further review.

liabilities established by the [FWPCA] 'shall in no way affect any rights which * * * the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance' " (Pet. App. A5). The court concluded that the plain language of Section 1321(h)(2) "unequivocably" states that the FWPCA does not exclude other remedies the government may have to recover its cleanup costs from sole-cause third parties (Pet. App. A24-A25), and it found nothing in the legislative history to indicate that the statute should not be read "according to its unambiguous expression" (*id.* at A25). Accordingly, the court held that "as against third parties * * * the United States may assert other causes of action than those established by subsection (g), or at least any others that are not inconsistent with the remedies thereby provided" (*ibid.*).

Applying this standard, the court of appeals reversed the dismissal of the maritime tort cause of action. First, the court had "little doubt" that recovery by the government for cleanup costs was "allowable under maritime law * * *" (Pet. App. A26). Second, the court expressed "little hesitation" in concluding that, in the circumstances of this case "such a [maritime tort] remedy is not inconsistent with the remedy provided by subsection (g) [of the FWPCA] * * * [and would] not thwart any Congressional purpose of the Act to protect vessel owners from potentially crushing liability and from an uninsurable risk" (*id.* at A27). This was so because there was no allegation that the BIG SAM's negligence had occurred with the knowledge and privity of its owner, and therefore any maritime tort liability would be confined by the Limitation of Liability Act (46 U.S.C.

183(a)) to the value of the vessel and its freight—a traditional measure of maritime tort liability against which vessels are insurable (Pet. App. A27-A28).[6] For these reasons, the court held that the FWPCA "did *not* preempt or exclude a remedy in simple-negligence maritime tort, subject to statutory limitation of liabilities, 46 U.S.C. Subsection 183(a)" (Pet. App. A24; emphasis in original).

3. The court of appeals denied petitions for rehearing and rehearing en banc (Pet. App. A30-A47). The panel "adhere[d] to its construction of subsections (g) and (h), as based on the unambiguous statutory language * * *—especially since the legislative history gives no reason to doubt that the legislative words mean precisely what they say" (*id.* at A31). The panel rejected petitioners' argument that its interpretation of the third-party-liability provisions of the FWPCA was inconsistent with decisions limiting the liability of dischargers to the statutory remedy in 33 U.S.C. (Supp. V) 1321(f) and precluding a maritime tort action against such dischargers, since the savings clause of subsection (h) applies by its terms only to third parties and not to dischargers. Moreover, the panel observed that third parties and dischargers were not similarly situated in practice and that the congressional concern to protect dischargers from "crushing potential liability against which insurance could not be procured because of the day-to-day exposure to risk

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[6] Because of the applicability of the Limitation of Liability Act, the court of appeals "expressly [did] not reach * * * [the] issue[], unnecessary for us to decide under present facts, * * * whether a maritime tort not subject to the limitation of liability because of the owner's knowledge or privity would be inconsistent with the remedy provided by the [Federal Water Pollution Control] Act for willful conduct or willful negligence" (Pet. App. A28).

of discharge in the transportation of oil" does "not necessarily implicate any inability of [third-party] vessels not engaged in such trade to secure insurance for tort damage resulting from collision with another vessel, whether or not it carried oil; or with crushing personal liability of the tort-causing vessel's owner in excess of the insurance limits, for these owners were already protected from such excessive exposure by the limitation of liability act, 46 U.S.C. § 183(a)" (Pet. App. A33-A34 n.5). Given these differences in "economic reality," it was not "illogical" or "inconsistent" to "conclude[] that third parties needed no such exclusive-liability feature [as had been applied in cases of dischargers] to obtain adequate insurance protection, as compared with those in the category of dischargers, who are exposed daily (rather than exceptionally) to the risk of causing oil-pollution damage" (*id.* at A36 & n.8). Emphasizing that "it is simply not part of our function as judges to re-write, in the guise of statutory construction, unambiguous statutory language" (*id.* at A36-A37), the panel explained that any problems arising from "this complicated legislation compromising conflicting interests" would be "for Congress to correct * * *, not the courts" (*id.* at A31 & n.1).

Four of the 13 active circuit judges dissented from the denial of rehearing en banc (Pet. App. A40). Although "in no sense certain that the panel opinion's construction, founded as it is on the rock of a literal reading of the statute, is incorrect" (*id.* at A41), the dissenters believed that the difference in the panel's treatment of third parties and the treatment of dischargers in an earlier Fifth Circuit decision was "sufficiently anomalous" (*id.* at A40) to call for consideration "by the en banc court, which exists to * * * harmonize panel decisions of our court" (*id.* at A41).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is unwarranted.

1. The court of appeals correctly construed the plain language of Section 1321(h)(2) to preserve the traditional maritime tort remedies available to the government against third parties who cause oil spills. As the court noted, Section 1321(h)(2) unambiguously states that the liabilities created by the FWPCA "shall *in no way* affect *any* rights which * * * the United States Government may have against *any third party* whose actions may in any way have caused or contributed to the discharge of oil" (Pet. App. A3) (emphasis added). The court of appeals thus followed this Court's directive to "assume 'that the legislative purpose is expressed by the ordinary meaning of the words used' * * * [and that], '[a]bsent a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive'" (Pet. App. A37, quoting *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982) (citations omitted)). Petitioners have pointed to nothing in the legislative history that "clearly expresse[s]" Congress' intent to exclude traditional maritime remedies against a sole-cause third party from the broad and manifest sweep of Section 1321(h), and those remedies therefore have not been displaced. See Note, *Oil Spills and Cleanup Bills: Federal Recovery of Oil Spill Cleanup Costs*, 93 Harv. L. Rev. 1761, 1778 (1980).

This reading of the plain language of Section 1321(h) to preserve traditional maritime tort remedies against sole-cause third parties is also supported

by the settled rule of construction that remedial environmental and safety legislation "is to be liberally construed to effectuate the congressional purpose." *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 13 (1980). To be sure, as the court below recognized (Pet. App. A31 n.1), the oil spill cleanup provisions of the FWPCA represent "complicated legislation compromising conflicting interests"; nevertheless, the evident purpose of the statute is to discourage the discharge of oil into the navigable waters of the United States and to provide for the cleanup of such spills without unnecessary and excessive expense to the public. See, *e.g.*, 33 U.S.C. (Supp. V) 1321(b)(1); 116 Cong. Rec. 9004 (1970) (remarks of Sen. Randolph) ("[T]he oil industry and oil shippers will bear the risk of cleanup of oil spills rather than the public. The conference measure * * * [provides] effective protection of the public interest"). By eliminating a traditional remedy for maritime torts, petitioners' narrow interpretation of the Act serves to impede this purpose and allows a tortfeasor to avoid the usual consequences of its actions. Such a constricted view of the statute is especially inappropriate where, as here, it would defeat pre-existing rights conferred upon the sovereign for the benefit of the Nation as a whole (cf. *United States* v. *United Mine Workers*, 330 U.S. 258, 272 (1947); *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 170-171 (1909))[7] and would

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[7] Petitioners in No. 82-1541 contend (Pet. 18-23) that the United States does not have standing under maritime law to bring a claim to recover its cleanup costs. This contention is without merit. When the government, in the exercise of its authority to maintain navigable waterways, expends funds to remove oil tortiously spilled by another, it is clearly entitled to restitution from the responsible party; contrary to peti-

"upset a 'long-established and familiar principle' of maritime law" (*Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 263 (1979), quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)).[8]

2. In asserting that the plain language of the statute should be disregarded, petitioners rely (82-1517 Pet. 15-19; 82-1541 Pet. 6-8) on cases construing the FWPCA to preclude the government's traditional maritime tort remedy against dischargers on the ground that 33 U.S.C. (Supp. V) 1321(f) provides the exclusive basis for recovery of cleanup costs

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tioners' argument, ownership of the river or riverbed is immaterial, since the government is seeking to be compensated for the expenditure of public funds necessitated by the wrongful discharge. The only other court of appeals to address this issue found, consistent with the decision below, that "[o]il pollution in navigable waters has been deemed a tort for which the United States is entitled to damages." *United States* v. *City of Redwood City*, 640 F.2d 963, 969-970 (9th Cir. 1981). Relying on *Redwood City* and on academic commentators, the court of appeals in the present case correctly concluded (Pet. App. A26-A27) that the United States could bring "an action to recover damages by way of cleanup costs * * * under maritime law for a maritime tort."

[8] Of course, it cannot be doubted, as petitioners urge (82-1517 Pet. 6, 9-12; 82-1541 Pet. 6, 10-18), that an Act of Congress may override federal common law. See, *e.g.*, *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981). The question presented here, however, is whether the provisions of the FWPCA do in fact supersede the government's right of action against a sole-cause third party under traditional maritime law. This is an issue of statutory construction that, as demonstrated above, Congress explicitly resolved in Section 1321(h) in favor of preserving the traditional tort remedy. Thus, the court of appeals' decision in no way conflicts with either the approach or the result in such cases as *City of Milwaukee* v. *Illinois*.

from dischargers. See *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981), and *Steuart Transportation Co.* v. *Allied Towing Corp.*, 596 F.2d 609 (4th Cir. 1979).[9] Noting that the liability standards under the FWPCA are virtually identical for dischargers (33 U.S.C. (Supp. V) 1321(f)) and third parties (33 U.S.C. (Supp. V) 1321(g)), and submitting that Congress could not have intended to allow greater liability for third parties than for dischargers, petitioners argue that the ruling below is erroneous and creates a conflict among the circuits. Accepting for present purposes (but without conceding) the correctness of *Oswego Barge* and *Steuart Transportation* with respect to dischargers, however, those decisions do not compel a different result in this case or conflict with the decision below regarding third parties.

The central factor influencing the court of appeals' ruling, which petitioners' argument ignores, is 33 U.S.C. 1321(h)(2). By its terms, Section 1321(h)(2) is applicable only to rights of the United States against a "third party" and not against a discharger (Pet. App. A3). Moreover, the Act contains no provision analogous to Section 1321(h)(2) in the case of a discharger. Indeed, the decisions in *Oswego Barge* (664 F.2d at 339, 341), *Steuart Transportation* (596 F.2d at 615-618), and *Dixie Carriers* (627 F.2d at 739, 742) explicitly noted the absence of a

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[9] Petitioners also rely on *United States* v. *Dixie Carriers, Inc.*, 627 F.2d 736 (5th Cir. 1980). However, any intra-circuit conflict between that case and the decision below does not call for this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901 (1957). At all events, *Dixie Carriers*, like the *Oswego Barge* and *Steuart Transportation* decisions discussed in the text, does not cast doubt upon or conflict with the holding in this case.

savings clause with respect to causes of action against dischargers and contrasted that statutory scheme with the provisions applicable to third parties. Thus, whatever the correct construction of the discharger provision of Section 1321(f) in the absence of any savings clause, Section 1321(h)(2) makes clear, as held by the court below, that the FWPCA does not limit the United States to its third-party remedy under Section 1321(g) but instead preserves the government's traditional maritime tort action against such third parties. See also *United States* v. *City of Redwood City*, 640 F.2d 963, 969-970 (9th Cir. 1981).[10]

In addition to this difference in the terms of the statute, there also is no reason to expect, as petitioners suggest, that the Act must treat dischargers and third parties in an identical fashion. Nothing in the text or history of the FWPCA requires such identity of treatment, and, as the court of appeals explained (Pet. App. A33 n.5, A36 n.8), different "economic realit[ies]" (*id.* at A36 n.8) regarding risk and insurability pertain to these two groups. Moreover, even under petitioners' construction, differences would remain between dischargers and third parties.

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[10] Because Section 1321(h)(2) is the relevant provision here in deciding whether the United States may pursue third-party remedies outside the FWPCA, it is immaterial that Sections 1321(f) and (g) use virtually identical language in establishing discharger and third-party liability under the Act. Furthermore, the most reasonable explanation for this similarity in language—that Congress sought to ensure that a third party would be no less liable under the Act than the discharger if the latter avoided liability on the ground that the discharge "was caused solely by * * * an act or omission of a third party" (33 U.S.C. (Supp. V) 1321(f)(1); Pet. App. A1)—sheds no light on the availability of traditional maritime remedies apart from the FWPCA.

For example, third-party liability pursuant to the FWPCA is imposed only where the third party caused the discharge "solely" by its act or omission or in combination with other enumerated (and limited) factors (33 U.S.C. (Supp. V) 1321(g); Pet. App. A2); with respect to a partial-cause third party the Act does not apply, and in those circumstances there can be no doubt that the government may pursue its traditional maritime tort remedy against the third party even assuming arguendo that it could not do so against the discharger. See *United States* v. *City of Redwood City*, *supra*, 640 F.2d at 968-970. Accordingly, petitioners' proffered construction does not resolve the asymmetry between dischargers and third parties.

Finally, contrary to petitioners' suggestion, we note that the government's remedy against a negligent third party under maritime tort law is not merely duplicative of its statutory FWPCA remedy for "willful negligence or willful misconduct" (33 U.S.C. (Supp. V) 1321(g); Pet. App. A2). Under the FWPCA, for example, the government is entitled to recover its "actual costs incurred" (33 U.S.C. (Supp. V) 1321(g); Pet. App. A2), while traditional maritime law "requires the government to justify its [cleanup] expenditures." Note, *Oil Spills and Cleanup Bills*, *supra*, 93 Harv. L. Rev. at 1777. In addition, "where the FWPCA [33 U.S.C. 1321(p)] makes the federal government the sole beneficiary of the assets it provides for recovery, * * * [maritime law (46 U.S.C. 184)] permits the government to claim but a proportional share" of the amount available for recovery (93 Harv. L. Rev. at 1777). Thus, by pursuing its maritime tort remedy against a third party

for negligence, the government forgoes certain special advantages provided by the FWPCA in cases of "willful negligence or willful misconduct." [11]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[11] We also reiterate that in this case there is no issue of unlimited liability because, as the court below recognized (Pet. App. A24, A27-A28, A32-A34 nn.3-5), petitioners are able to invoke the protections of the Limitation of Liability Act, 46 U.S.C. 183(a). We do point out, however, that even under petitioners' reading of the statute it is possible for a negligent third party to be subject to liability beyond the limits specified in Section 1321(g)—for example, if a state rather than the federal government undertook the cleanup and sought to recover its costs. See 93 Harv. L. Rev. at 1779-1782. For this reason, third parties generally will need insurance coverage beyond the FWPCA limits provided for federal recovery against non-willful defendants.

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